

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) CR 92-749 SVW
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)
Plaintiff,) ORDER DENYING DEFENDANT'S
) MOTION FOR REDUCTION OF
v.) SENTENCE [277]
)
)
DARCY IRA THIGPEN,)
)
)
Defendants.)
)

I. INTRODUCTION

Darcy Thigpen ("Defendant") moves for a reduction in his sentence pursuant to 18 U.S.C. § 3582(c)(2). Defendant contends that even though he was sentenced as a "career offender," his sentence was "based on" a sentencing guideline that was subsequently lowered by the Sentencing Commission's retroactive crack amendment, and therefore, he is entitled to a resentencing. For the reasons that follow, Defendant's Motion is DENIED.

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1 **II. FACTS**

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3 On October 15, 1992, a jury convicted Defendant of possession with
 4 intent to distribute cocaine and crack cocaine and possession of a
 5 firearm, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 924(c).
 6 Given the amount of cocaine and crack involved, the Court calculated
 7 Defendant's base offense level to be 32. Defendant also had 12
 8 criminal history points, which put him in criminal history category V.
 9 With the base offense level of 32, Defendant's sentencing range would
 10 have been 188-235 months.

11 The Court also found, however, that Defendant was a "career
 12 offender" within the meaning of United States Sentencing Guidelines §
 13 4B.1.¹ Thus, because one of his convictions came with a statutory
 14 maximum penalty of life imprisonment, Defendant's base offense level
 15 was increased to level 37. Defendant's sentencing range therefore was
 16 360 months to life. Due to an additional mandatory 60 month sentence
 17 for the use of a firearm, the Court sentenced Defendant to 420 months
 18 in prison.

19 On appeal, Defendant argued that the Court erred because the Court
 20 thought it did not have the discretion to depart downward on
 21 Defendant's sentence. In United States v. Lawrence, the Ninth Circuit
 22 held that a court can apply a downward departure if the "defendant's
 23 criminal history category significantly over-represents the seriousness
 24 of a defendant's criminal history or the likelihood that the defendant
 25 will commit further crimes.'" 916 F.2d 553, 554 (9th Cir. 1990)

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27 ¹ Defendant had prior convictions for robbery on August 24, 1986, and
 28 possession of marijuana for sale on June 19, 1991.

1 (quoting U.S.S.G. § 4A1.3, policy statement). Defendant argued that
 2 the Court had erred because it did not recognize that it had this
 3 discretion.

4 The Ninth Circuit rejected this argument, noting that in the
 5 transcript from the hearing, the Court said "[defendants] do
 6 legitimately come within the category of career offenders and the cases
 7 don't, the facts here don't justify a departure." United States v.
8 Thigpen, 1994 WL 59791, at *12 (9th Cir. 1994). The Ninth Circuit
 9 found that the Court understood that downward departure was available
 10 pursuant to Lawrence, but that the necessary mitigating factors were
 11 not present in Defendant's case. Id. Thus, the Court exercised its
 12 discretion not to depart downward.

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14 **III. ANALYSIS**

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16 Defendant argues that he is entitled to a resentencing pursuant to
 17 18 U.S.C. § 3582(c)(2), which provides in pertinent part:

18 The court may not modify a term of imprisonment once it has been
 19 imposed except . . . in the case of a defendant who has been
 20 sentenced to a term of imprisonment based on a sentencing range
 21 that has subsequently been lowered by the Sentencing Commission
 22 pursuant to 28 U.S.C. § 994(o), . . . the court may reduce the
 23 term of imprisonment, after considering the factors set forth in
 24 section 3553(a) to the extent that they are applicable, if such a
 25 reduction is consistent with applicable policy statements issued
 26 by the Sentencing Commission.

1 Amendment 706 to the Sentencing Guidelines, which was made effective
 2 November 1, 2007, reduces the base offense level for crack offenses by
 3 two levels, and has been given retroactive effect. See U.S.S.G. §
 4 1B1.10(c).

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6 **A. Policy Statement**

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8 As an initial matter, the Government contends that Defendant
 9 cannot be resentenced because to do so would be inconsistent with the
 10 Guidelines' applicable policy statements. (Opp'n, at 6.) Section
 11 3582(c)(2) says that courts may reduce the term of imprisonment "if
 12 such a reduction is consistent with applicable policy statements issued
 13 by the Sentencing Commission." Effective March 3, 2008, the Sentencing
 14 Commission passed a revised version of § 1B1.10(a)(2), which states
 15 that "[a] reduction in the defendant's term of imprisonment is not
 16 consistent with this policy statement and therefore not authorized . . .
 17 . if . . . an amendment . . . does not have the effect of lowering the
 18 defendant's applicable guideline range."

19 The policy statement standing alone, however, does not preclude
 20 the Court from resentencing Defendant. In United States v. Hicks, the
 21 Ninth Circuit considered whether courts must comply with the Sentencing
 22 Commission policy statements when they resentence a defendant pursuant
 23 to § 3582(c)(2). 472 F.3d 1167, 1172 (9th Cir. 2007). The Ninth
 24 Circuit held that "under Booker, to the extent that policy statements
 25 would have the effect of making the Guidelines mandatory . . . , they
 26 must be void." Id. The Court reasoned that, under Booker, "the
 27 Guidelines are no longer mandatory in any context." Id. at 1173

1 (emphasis in original). "Thus, to the extent that the policy
 2 statements are inconsistent with Booker by requiring that the
 3 Guidelines be treated as mandatory, the policy statements must give
 4 way." Id. It is therefore clear that the Ninth Circuit has rejected
 5 the notion that, when applying § 3582(c)(2), that courts must strictly
 6 comply with the applicable policy statements.

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8 **B. Term of Imprisonment "Based On" a Sentencing Range that has**
 9 **Subsequently Been Lowered**

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11 In light of the fact that the policy statement is not controlling,
 12 the issue then becomes whether Defendant's initial sentence was "based
 13 on" a sentencing range that has subsequently been lowered. See §
 14 3582(c)(2). Defendant argues that his original sentence was "based on"
 15 such a range because the Court initially looked to the base offense
 16 level of 32, and then enhanced the level upward to 37 due to his
 17 classification as a "career offender." (Mot., at 7.) Since the
 18 original level of 32 would be reduced to 30 under Amendment 706,
 19 Defendant contends that this sentence was "based on" a sentencing range
 20 that was subsequently lowered.

21 The Eighth and Eleventh Circuits are the only two circuits to
 22 address the issue, and both have rejected precisely the argument that
 23 Defendant advances here. In United States v. Tingle, the Eighth
 24 Circuit noted that "[a]lthough the Sentencing Commission lowered the
 25 offense levels in U.S.S.G. § 2D1.1(c) related to crack cocaine drug
 26 quantities, it did not lower the sentencing range for career offenders
 27 under U.S.S.G. § 4B1.1, which is what set [the defendant's] range."

1 524 F.3d 839, 840 (9th Cir. 2008). Thus, the court held that
 2 "[b]ecause [the defendant] was not sentenced based on a sentencing
 3 range that has since been lowered, he has not met the eligibility
 4 requirements for a reduction of his sentence under § 3582(c)(2)." Id.

5 Similarly, in United States v. Moore, the Eleventh Circuit noted
 6 that the plain language of the statute only "applies to a defendant
 7 whose sentence was 'based on' a subsequently-lowered 'sentencing
 8 range.'" 541 F.3d 1323, 1327 (11th Cir. 2008). The court reasoned
 9 that since "the defendants' sentences were based on the guideline
 10 ranges applicable to career offenders under § 4B1.1," the "defendants'
 11 base offense levels under § 2D1.1 played no role in the calculation of
 12 these ranges." Id. Thus, the court held "Amendment 706's effect on
 13 the defendants' base offense levels would not lower the sentencing
 14 ranges upon which their sentences were based." Id.; see also United
15 States v. Thomas, __ F.3d __, 2008 WL 4659359, at *1 (11th Cir. 2008)
 16 ("We explained in Moore that, '[w]here a retroactively applicable
 17 guideline amendment reduces a defendant's base offense level, but does
 18 not alter the sentencing range upon which his or her sentence was
 19 based, § 3582(c)(2) does not authorize a reduction in sentence.'").

20 Research reveals that every other court to consider the issue has
 21 reached the same result, finding that Amendment 706 does not entitle a
 22 "career offender" to a resentencing because the defendant's initial
 23 sentencing was not "based on" a range that has subsequently been
 24 lowered. See, e.g., United States v. Johnson, 2008 WL 3928921, at *6
 25 (E.D. Wash. 2008) ("Defendant was sentenced as a career offender under
 26 the Sentencing Guidelines, and his sentence was not determined by the
 27 amount of crack cocaine at issue."); United States v. Lee, 2008 WL

1 2357243, at *2 (N.D. Cal. 2008) (applying the Eighth Circuit ruling in
 2 Tingle, which "narrowly defined 'based on' to apply only to the
 3 sentencing range that actually served as the trigger for the
 4 defendant's sentence."); United States v. Duran-Romero, 2008 WL
 5 4449877, at *3 (D. Or. 2008) (finding that the defendant was not
 6 sentenced "based on" a Guideline range that was subsequently lowered);
 7 United States v. Biami, 548 F. Supp. 2d 661, 664 (E.D. Wisc. 2008) ("It
 8 would make little sense to permit the court to re-open a sentence based
 9 on a guideline amendment that would not, if applied to the defendant,
 10 make any difference in the outcome.").

11 Application of the relevant sentencing procedure supports the
 12 conclusion that Defendant's sentence was not "based on" a sentencing
 13 range that was subsequently lowered. When Defendant was sentenced, the
 14 Court began its analysis by looking at the applicable sentencing range
 15 under § 2D1.1(c)(6). Because the sentence involved the equivalent of
 16 between 1,000 to 3,000 kilograms of marijuana, the base offense level
 17 was 32. The sentence was then adjusted upward pursuant to § 4B1.1
 18 because Defendant was a "career offender." In Defendant's case, the
 19 statutory maximum offense level for his crime was life in prison.
 20 Therefore, Defendant's offense level was increased to 37. See U.S.S.G.
 21 § 4B1.1(b). It was not the base offense level of 32 that determined
 22 the upward adjustment to 37; it was the statutory maximum offense level
 23 that determined the upward adjustment. Thus, the Court concludes that
 24 Defendant's offense level of 37, which ultimately set the sentencing

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1 range, was not based on a sentencing range that has subsequently been
2 lowered.²

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4 **IV. CONCLUSION**

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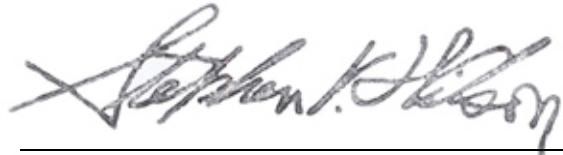
6 The Court finds that the retroactive crack amendment does not
7 entitle Defendant to a resentencing because Defendant's original
8 sentence was not "based on" a sentencing range that has subsequently
9 been lowered. Therefore, Defendant's Motion for Resentencing is
10 DENIED.

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12 IT SO ORDERED.

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14 DATED: November 12, 2008



15 STEPHEN V. WILSON
16 UNITED STATES DISTRICT JUDGE

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28 ² Defendant is not entitled to a resentencing based on Booker alone.
See Hicks, 472 F.3d at 1171.